No. 89-65

In the Supreme Court of the United States

OCTOBER TERM, 1989

FORT STEWART SCHOOLS, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the wages and money-related fringe benefits of federal employees whose rate of compensation is not entirely fixed by statute are negotiable "conditions of employment" under 5 U.S.C. 7103(a).

2. Whether compensation-related proposals—such as the Union's proposal in this case to raise the salaries of employees at two schools for dependents of Army personnel by 13.5%—are non-negotiable because they interfere with an agency's management right under 5 U.S.C. 7106(a) to set the agency's budget.

3. Whether the Union's proposals in this case are non-negotiable under 5 U.S.C. 7117 because they are "the subject of [an] agency rule or regulation" for which there is a "compelling need."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 860 F.2d 396. The decision of the Federal Labor Relations Authority (Pet. App. 31a-54a) is reported at 28 F.L.R.A. 547.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a-20a) was entered on November 21, 1988. A timely petition for rehearing was denied on February 17, 1989 (Pet. App. 55a-56a). On May 11, 1989, Justice Kennedy extended the time within which to

file a petition for a writ of certiorari to and including July 17, 1989. The petition for a writ of certiorari was filed on that date, and was granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Title VII of the Civil Service Reform Act, also known as The Federal Service Labor-Management Relations Statute

Section 7102 (5 U.S.C.) provides in relevant part:

> Each employee shall have the right * * *
>
> * * * * *
>
> (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7103 (5 U.S.C.) provides in relevant part:

> (a) For the purpose of this chapter—
>
> * * * * *
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters
>
> * * * * *
>
> (C) to the extent that such matters are specifically provided for by Federal statute[.]

Section 7106(a)(1) (5 U.S.C.) provides:

> (a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

> (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency * * *.

Section 7117 (5 U.S.C.) provides in relevant part:

> (a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.
>
> (2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

B. The dependents school statute and regulation

Section 241 (20 U.S.C.), originally enacted as Title I, Section 6 of ch. 1124, 64 Stat. 1107, provides in relevant part:

> (a) In the case of children who reside on Federal property—
>
> * * * * *
>
> the Secretary shall make such arrangements (other than arrangements with respect to the acquisition of land, the erection of facilities, interest, or debt service) as may be necessary to provide free public education for such children. * * * To the maximum extent practicable, the local

educational agency, or the head of the Federal department or agency, with which any arrangement is made under this section, shall take such action as may be necessary to ensure that the education provided pursuant to such arrangement is comparable to free public education provided for children in comparable communities in the State, or, in the case of education provided under this section outside the continental United States, Alaska, and Hawaii, comparable to free public education provided for children in the District of Columbia. For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure, leave, hours of work, and other incidents of the employment relationship may be fixed without regard to the Civil Service Act and rules * * *.

* * * * *

(e) To the maximum extent practicable, the Secretary shall limit the total payments made pursuant to any such arrangement for educating children within the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State. The Secretary shall limit the total payments made pursuant to any such arrangement for educating children outside the continental United States, Alaska, or Hawaii, to an amount per pupil which will not exceed the amount he determines to be necessary to provide education comparable to the free public education provided for children in the District of Columbia.

Army Reg. 352-3, 1-7 provides:

Comparison factors. Education provided pursuant to the provisions of Section 6 for children residing on Federal property will be considered comparable to free public education offered by selected communities of the State when the following factors are, to the maximum extent practicable, equal:

a. Qualifications of professional and nonprofessional personnel.
b. Pupil-teacher ratios.
c. Curriculum for grades offered, including kindergarten and summer school, if applicable.
d. Accreditation by State or other accrediting association.
e. Transportation services (student and support).
f. Length of regular and/or summer term(s).
g. Types and number of professional and nonprofessional positions.
h. Salary schedules.
i. Conditions of employment.
j. Instructional equipment and supplies.

STATEMENT

This case involves the negotiability of proposals to increase the compensation of federal employees. The employees in this case are teachers at schools for the dependents of personnel stationed at Fort Stewart, an Army base in Georgia.

A. The Statutory And Regulatory Framework

1. *The federal labor relations statute*

Title VII of the Civil Service Reform Act of 1978 (CSRA) (sometimes referred to as the Federal Service Labor-Management Relations Statute), 5 U.S.C. 7101-7135, establishes "the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco*

and Firearms v. *FLRA*, 464 U.S. 89, 91 (1983). The statute grants to federal employees the right to bargain collectively over their "conditions of employment." 5 U.S.C. 7102(2). The phrase "conditions of employment" is defined to include "personnel policies, practices, and matters * * * affecting working conditions, * * * (C) to the extent such matters are [not] specifically provided for by Federal statute." 5 U.S.C. 7103(a)(14). Whether or not a matter is a "condition[] of employment," the statute generally provides that nothing in it shall "affect the authority of any management official of any agency" with respect to certain enumerated "management rights," including the right "to determine the * * * budget * * * of the agency." 5 U.S.C. 7106(a)(1). The statute also precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)) and over "matters which are the subject of any agency rule or regulation" for which there is a "compelling need" (5 U.S.C. 7117(a)(2)). See generally *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. 1261, 1262 (1988).

It is undisputed that proposals relating to the compensation of federal employees are generally not negotiable under this scheme. The pay of most federal employees is set by the General Schedule (see 5 U.S.C. 5332), and their benefits are also governed by statute. Therefore, compensation is not a "condition[] of employment" under Section 7103(a)(14)(C) with respect to those employees, since it is "specifically provided for by Federal statute." In addition, it is clear that bargaining over the compensation of employees subject to the General Schedule would be

barred by Section 7117(a) as "inconsistent with * * * Federal law." [1] The largest group of federal employees governed by Title VII of the CSRA who are not paid according to the General Schedule are craft workers subject to the Prevailing Rate Act. See 5 U.S.C. 5341, 5342(a)(2); Union's Br. in Opp. 4a. It is undisputed that those craft workers may not bargain about compensation (see *id.* at 16) because the Prevailing Rate Act provides that they are to be paid according to the results of wage surveys conducted in accordance with procedures established by the Office of Personal Management. 5 U.S.C. 5343.[2]

Under Title VII of the CSRA, if management officials decline to negotiate over a union's bargaining proposal, the union may file a negotiability appeal with the Federal Labor Relations Authority (FLRA or Authority). See 5 U.S.C. 7105(2)(E), 7117(c). The FLRA then makes a determination—reviewable in the courts of appeals—as to whether the union's proposal is subject to the bargaining obligation (5 U.S.C. 7117(c)(6)). See *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 93. The FLRA's determination that a particular bargaining proposal is negotiable does not, in and of itself, require the adoption of that proposal. But if negotiation reaches an impasse, either party may refer the matter to the Federal Service Impasses Panel, and the Panel is

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[1] We would add, although the respondents do not agree with this third ground, that bargaining over the wages of any federal employees subject to Title VII of the CSRA conflicts with agency management's right to set the agency budget.

[2] Another large group of federal employees, postal workers, are not governed by Title VII of the CSRA. 5 U.S.C. 2105(e). Their governing statute expressly provides that wages are negotiable. 39 U.S.C. 1201 note.

empowered to "take whatever action is necessary and not inconsistent with [the statute] to resolve the impasse" (5 U.S.C. 7119(c)(5)(B) (iii)), including the imposition of the disputed contract term upon the parties. See, *e.g.*, *National Federation of Federal Employees* v. *FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986); *Indiana Air National Guard* v. *FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983). Thus, in contrast to private sector collective bargaining, a determination that a proposal is negotiable "subjects the agency to the possibility that the Federal Service Impasses Panel will resolve the dispute by imposing a binding proposal upon the agency." *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225, 1227 (4th Cir. 1989) (en banc).

2. The domestic dependents schools statute and regulation

Section 6 of Title I of ch. 1124, 64 Stat. 1107, codified as amended at 20 U.S.C. 241(a), provides for a free public education for eligible children living on federal property in the United States. The statute governing these "Section 6 schools" or "dependents schools" provides that, "[t]o the maximum extent practicable," the Secretary of Education "shall take such action as may be necessary to ensure that the education provided * * * is comparable to free public education provided for children in comparable communities in the State."[3] 20 U.S.C. 241(a). The statute further provides that "personnel may be employed and [their] compensation * * * fixed without regard to the Civil Service Act" and other federal laws governing pay, leave, and benefits. 20 U.S.C. 241(a).[4] Again "[t]o the maximum extent practicable", 20 U.S.C. 241(e) imposes an obligation on federal agencies to limit "the total payments * * * for educating children [at dependents schools] * * * to an amount per pupil which will not exceed the per pupil cost of free public education provided for children in comparable communities in the State."

In order to implement the statutory obligations imposed on the operation of Section 6 schools, the Army has issued a regulation governing the education of dependents. Army Reg. 352-3, 1-7. That regulation states that the education provided by dependents schools "will be considered comparable to free public education offered by selected communities of the States" when ten factors, including "salary schedules," are, "to the maximum extent practicable, equal." *Id.* at 352-3, 1-7(h).

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[3] The Secretary of Education and his predecessors have delegated the day-to-day operation of the schools to the individual branch of the armed services with which the installation is affiliated. See S. Rep. No. 1137, 95th Cong., 2d Sess. 106-107 (1978).

[4] There are "forty-odd federal pay systems which are not entirely fixed by statute." *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 989 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989). In addition to teachers at domestic dependents schools, included among the federal employees who are not subject to the General Schedule or the Prevailing Rate Act are teachers at overseas dependents schools, which are governed by a different statute (20 U.S.C. 901-907) from that governing domestic schools; civilian mariners employed by the Navy, whose pay, under 5 U.S.C. 5348, is set by comparison with mariners employed by private vessels; electricians employed by the Bureau of Engraving and Printing, who are governed by 5 U.S.C. 5349(a); and employees of the Nuclear Regulatory Commission, who are excepted from the General Schedule by 42 U.S.C. 2201(d).

B. Proceedings Below

In this case, the Fort Stewart Association of Educators (the Union), which is the collective bargaining representative for employees of the two elementary schools operated by Fort Stewart under the Section 6 program, submitted three proposals for negotiation. The first proposal, which consisted of 15 subparts, concerned, among other things, health insurance, life insurance, and mileage reimbursement. Pet. App. 31a-34a. The second proposal sought to increase the salary of all bargaining unit members by 13.5%. *Id.* at 34a. The third proposal, which also had numerous subparts, concerned various types of leave, including sick leave, annual leave, personal leave, professional leave, court leave, maternity/paternity/adoption leave, and leave without pay. *Id.* at 48a-54a.

1. ***The FLRA's decision***

In a two-to-one decision, the FLRA determined that the three proposals were, for the most part, negotiable.[5] The Authority first rejected the agency's argument that teachers' pay is not among the condi-

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[5] The FLRA held that Subparts L and M of Proposal 1, which proposed that the schools provide free health and life insurance, were not negotiable because they were inconsistent with federal law within the meaning of 5 U.S.C. 7117(a)(1). It reached that conclusion because federal statutes limit the amount the schools may contribute toward health insurance and specifically require union members to contribute toward life insurance. Pet. App. 41a. The Authority also held that Section F(1) of Proposal 3, which proposed that leave without pay "may be approved at the discretion of the immediate supervisor" (*id.* at 53a), infringed on management's reserved right to assign work. *Id.* at 44a; see 5 U.S.C. 7106(a)(2)(B). These holdings are not before this Court.

tions of employment made negotiable by Title VII of the CSRA. The FLRA adhered to its prior decision that bargaining over employee compensation is permissible so long as "(1) the matters proposed are not specifically provided for by law and are within the discretion of the agency; and (2) the proposals involved are not otherwise inconsistent with law, applicable Government-wide rule or regulation, or with an agency regulation supported by a compelling need." Pet. App. 35a. In this case, the Authority found that nothing in 20 U.S.C. 241 or its legislative history "indicates that Congress intended to restrict an agency's discretion concerning the particular employment practices relating to compensation which could be adopted." Pet. App. 36a.

The Authority also found that the proposals did not interfere with the agency's right to determine its budget, because the Army had not made a "substantial showing that the proposal requires the inclusion of a particular program or amount in its budget or that the proposal will result in significant and unavoidable increases in cost not affected by compensating benefits." Pet. App. 36a. After noting that the dependents school system is comprised of "seven additional bargaining units with 626 members whose salaries total $11.3 million," the Authority nevertheless concluded that the agency "has failed to establish that increased costs could be expected or even that increased costs would be unavoidable." *Id.* at 37a. The Authority also concluded that the agency had failed to demonstrate that "any increased costs * * * would not be offset by compensating benefits," although it did not identify any benefits that might offset the increased costs. *Id.* at 37a-38a.

Finally, the Authority found that the agency had failed to show a compelling need for Army Regulation 352-3, 1-7(h), which requires equality of salaries between the dependents schools and their comparable community counterparts. The Authority instead found that the statute governing dependents schools was not "intended to restrict the Agency's discretion as to the particular employment practices which could be adopted." Pet. App. 40a-41a (citation omitted).[6]

Chairman Calhoun dissented, restating his belief that "in the absence of a clear expression of congressional intent to make wages and money-related fringe benefits negotiable," such matters "are not within the duty to bargain." Pet. App. 46a.

2. ***The court of appeals' opinion***

The court of appeals upheld the Authority's decision. Pet. App. 1a-30a. The court stated that the definition of "conditions of employment as 'personnel practices and matters * * * affecting working conditions' * * * alone does not exclude compensation and fringe benefits." Pet. App. 7a. The court dismissed statements in the statute's legislative history that "baldly assert that wages are not negotiable" (*id.* at 12a) on the ground that they were made "with the understanding that the Congress generally regulates such matters" (*id.* at 10a). Paying deference to the FLRA's interpretation of the statute (*id.* at 7a), the court concluded that wages are conditions of employment under Section 7103(a)(14).

[6] The Authority also rejected the agency's arguments that the proposals violated a federal procurement statute, 10 U.S.C. 2304, and the Antideficiency Act, 31 U.S.C. 1341. Pet. App. 39a-40a. These objections were not pressed on appeal and are not before this Court.

The court also deferred to the FLRA's determination that the proposals did not interfere with the agency's right to set its budget. Pet. App. 19a-20a. The court first held that the proposals "would not necessarily increase the Army's costs." *Id.* at 20a. In any event, it concluded, "any increase in the employees' salaries would not significantly increase the Army's budget," since the Army's budget "includes bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." *Ibid.* The court also held that even if it were clear that the Army's costs would increase, the Army had failed to show that there would be "no compensating benefits." *Ibid.*

In addition, while acknowledging that the proposals conflicted with the Army's regulation mandating equality of salaries, the court held that the Army had not established a "compelling need" for that regulation. Pet. App. 18a-19a. The court found that 20 U.S.C. 241 does not itself "require" the Army to compensate its teachers according to local public school practices. Pet. App. 18a. Moreover, the court found that the regulation was not "essential" to the statutory mandate requiring a "comparable education at a comparable cost per pupil" (*ibid.*), since "many expenses beyond * * * salaries"—including "books, building maintenance, athletic programs, clubs, and lunch service"—"enter into the per pupil expenditures," and "[m]any factors other than teachers' compensation also affect the quality of education" (*id.* at 18a-19a).

SUMMARY OF ARGUMENT

1. Congress did not intend to authorize federal employees to bargain collectively over their compensation. It extended the obligation to bargain only to "conditions of employment" (5 U.S.C. 7102(2)), a phrase it defined to include "matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)), but said nothing about wages or other forms of compensation. The phrase "conditions of employment" suggests the physical aspects of the working environment, not compensation. Moreover, the distinction between wages and conditions of employment has long been established in other federal laws concerning labor relations. And in the two cases where Congress has authorized federal employees to bargain over compensation—involving postal workers (see 39 U.S.C. 1201 note) and certain craft employees (see 5 U.S.C. 5343 note)—it did so explicitly.

The statute's legislative history removes all doubts on the issue. As an initial matter, Congress specifically rejected proposals that would have made wages negotiable generally and in cases such as this. The participants in the legislative debates then repeatedly assured their colleagues that the statute does not permit bargaining on economic matters.

In addition, common sense suggests that Congress would not obliquely have authorized federal employees to bargain over compensation. Wages and fringe benefits lie at the core of collective bargaining in the private sector. One would therefore expect that any legislation granting the right to bargain over those subjects—and a further right to outside arbitration when bargaining leads to an impasse—would confer those rights in no uncertain terms.

2. The Union's proposal to increase teachers' salaries by 13.5% also conflicts with the right to determine the agency's budget, a right reserved to management by 5 U.S.C. 7106(a)(1). Since teachers' salaries are by far the largest item in any school's budget, the proposal would result in an unavoidable and significant increase in the cost of operating the Fort Stewart schools. The court of appeals' contrary conclusion, reached only by comparing the cost of the Union's proposals to the Army's budget as a whole—including expenditures for bases, weapons, and troops—threatens to eliminate the budget right altogether. The court also erred in demanding that the Army prove that an across-the-board salary increase would not result in "compensating benefits" which would offset the resulting increased costs. The statute grants to the agency, not the FLRA, the right to decide whether a given expenditure will result in sufficient benefits to make the expenditure worthwhile.

3. The proposals are also non-negotiable because they conflict with an Army regulation (Army Reg. 352-3, 1-7) for which there is a "compelling need" (5 U.S.C. 7117(a)(2)). The statutory provisions governing the Section 6 school program require the Army to "ensure" as far as possible that the education provided by the schools is "comparable" to that provided by local public schools (20 U.S.C. 241(a)), and at the same time limit the per-pupil cost of the Army schools to no more than the per-pupil cost of those local schools (20 U.S.C. 241(e)). The Army has properly implemented these statutory commands by requiring that the "salary schedules" of its schools be "equal" to those of the local public schools. Army Reg. 352-3, 1-7(h). The court of appeals' suggestion that substantial increases in salaries, benefits, and

paid leave could be made up by reducing expenditures for "books, building maintenance, athletic programs," and other matters (Pet. App. 18a-19a)—all the while leaving the quality of education unaffected and not running afoul of the per-pupil cost limitation—is unwarranted and unrealistic.

ARGUMENT

I. THE FEDERAL LABOR RELATIONS STATUTE DOES NOT AUTHORIZE FEDERAL EMPLOYEES TO BARGAIN COLLECTIVELY OVER THEIR WAGES AND MONETARY FRINGE BENEFITS

Although the Authority's interpretations of Title VII of the CSRA are generally entitled to deference, reviewing courts "cannot rubber-stamp * * * decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983) (citations omitted); accord *FLRA* v. *Aberdeen Proving Ground*, 108 S. Ct. 1261, 1263 (1988). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In this case, the language, structure, and legislative history of Title VII of the CSRA show that Congress did not intend to authorize federal employees to bargain over their compensation. Four courts of appeals have therefore held that the FLRA erred in concluding that wages are negotiable "conditions of employment." *Nuclear Regulatory Commission* v. *FLRA*, 879 F.2d 1225, 1231 (4th Cir. 1989) (en banc), petitions for cert. pending, Nos. 89-198, 89-562; *Fort Knox Dependent Schools* v. *FLRA*, 875 F.2d 1179, 1181 (6th Cir. 1989), petition for

cert. pending, No. 89-736; *Department of Defense Dependents Schools* v. *FLRA*, 863 F.2d 988, 994 (D.C. Cir. 1988), reh'g en banc granted (Feb. 6, 1989); *Department of the Navy, Military Sealift Command* v. *FLRA*, 836 F.2d 1409, 1419 (3d Cir. 1988).[7]

1. Title VII of the CSRA extends collective bargaining in the federal workplace only to "conditions of employment" (5 U.S.C. 7102(2)), which it defines as "personnel policies, practices, and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)). Examined in isolation, this language is most naturally read to refer to the physical conditions under which an employee labors. As the District of Columbia Circuit has noted, "[t]he term 'working conditions' ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job." *Department of Defense Dependents Schools*, 863 F.2d at 990; see also *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring) (the phrase "conditions of employment" is most naturally read to encompass "the various physical dimensions" of an employee's "working environment"). Wages are not a matter "affecting working conditions." Instead, the opposite is true: one's compensation may be adjusted to take account of differences in working conditions, not the other way around. *Department of Defense Dependents Schools*, 863 F.2d at 990.

A review of other federal labor statutes confirms that Congress does not regard "wages" as a "condition[] of employment." To the contrary, it has always specifically mentioned compensation when it in-

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[7] Only the Second Circuit has agreed with the court below on this issue. *West Point Elementary School Teachers Association* v. *FLRA*, 855 F.2d 936, 942 (1988).

tends to authorize wage bargaining. In the private sector, the National Labor Relations Act authorizes collective bargaining over "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d).[8] As the Third Circuit noted in *Military Sealift Command*, "Congress's use of only 'conditions of employment' implies a narrower range of bargainable matters under the Labor-Management Statute than under the NLRA." 836 F.2d at 1416 n.14; accord *Fort Knox Dependent Schools*, 875 F.2d at 1181. In the Postal Reorganization Act, by contrast, Congress expressly granted postal workers the right to bargain over "wages, hours, *and* working conditions." 39 U.S.C. 1201 note (Labor Agreements) (emphasis added). It thus distinguished between "wages" and "working conditions."[9] Congress was well aware of

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[8] The court below reasoned that "[b]y using the word "other," Congress included wages and hours in the general category of "conditions of employment." Pet. App. 8a. But the phrase employed in 29 U.S.C. 158(d) is "wages, hours, and other *terms* and conditions of employment" (emphasis added). The symmetry of the phrase suggests that wages were thought to be a "term" and hours a "condition" of employment. *Department of Defense Dependents Schools*, 863 F.2d at 991.

Other sections of the NLRA employ sightly different terminology. See 29 U.S.C. 151 (preamble) (referring to "the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions"); 29 U.S.C. 159 (mentioning "rates of pay, wages, hours of employment, or other conditions of employment"). Neither of these alternative formulations equates wages with conditions of employment, however, and both are consistent with the conclusion that Congress thinks of *hours*, but not wages, as a condition of employment.

[9] Other federal statutes make the same distinction. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-

these other statutory provisions when it enacted the CSRA. See, *e.g.*, H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978) (recognizing NLRA); 124 Cong. Rec. 29,182 (1978) (remarks of Sen. Udall) (noting bargaining practice in Postal Service). Thus if Congress had intended to authorize bargaining over wages and wage-related benefits, it would have said so.

Congress also distinguished between wages and conditions of employment in Section 704 of the CSRA. That Section provides that those craft employees (see 5 U.S.C. 5342(a)(2)) who bargained over compensation prior to 1972 may continue to bargain over "terms and conditions of employment and other employment benefits," including "pay and pay practices." 92 Stat. 1218, *reprinted in* 5 U.S.C. 5343 note. "The normal rule of statutory construction assumes

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2(a)(1) (prohibiting discrimination "with respect to his compensation, terms, conditions, or privileges of employment"); Defense Department Overseas Teachers Pay and Personnel Program Act, 20 U.S.C. 902 (distinguishing between authority to promulgate regulations concerning "the payment of compensation" (20 U.S.C. 902(a)(4)) and regulations concerning "the conditions of employment" (20 U.S.C. 902(a)(6)) of overseas teachers); 25 U.S.C. 2011 (making the same distinction with regard to teachers at Indian schools).

There are a few statutes that do not clearly distinguish pay from conditions of employment. See The Senior Executive Service Act, 5 U.S.C. 3131(1) (providing for "a compensation system, including salaries, benefits, and incentives, and for other conditions of employment"); 18 U.S.C. 4082(c)(2)(iii) (providing for "the rates of pay and other conditions of employment" of federal prisoners on work-release). But even these relatively obscure statutes do not expressly define wages to be a condition of employment. In any event, they show that when Congress addresses the subject of federal compensation, it does so by using terms that admit of no uncertainty.

that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) (citations omitted). Accordingly, there is no reason to conclude that Congress intended that "conditions of employment" would encompass wages in Title VII of the CSRA when, in providing in Section 704 of the same Act that certain employees could bargain over wages, it spoke of *terms* and conditions of employment, and specifically mentioned pay and pay practices.[10]

2. Any doubt as to Congress's intent to exclude compensation-related matters from the definition of conditions of employment is removed by the statute's legislative history. That history is "replete * * * with indications that Congress did not intend to subject pay of federal employees to bargaining." *Military Sealift Command*, 836 F.2d at 1417; accord *Nuclear Regulatory Commission*, 879 F.2d at 1228; *Fort Knox Dependent Schools*, 875 F.2d at 1181; *Department of Defense Dependents Schools*, 863 F.2d at 992.

In enacting Title VII of the CSRA, Congress twice rejected proposals to make pay negotiable. First, Congressman Ford introduced a bill that would have made pay generally negotiable for federal employees (see 124 Cong. Rec. 25,721 (1978) (discussing H.R. 9094)), but the bill was not passed. Later, in the

[10] The statute's explicit preservation of management's right to "determine the * * * budget * * * of the agency" (5 U.S.C. 7106(a)(1)) is also inconsistent with the conclusion that Congress intended to authorize collective bargaining over federal wages. It makes little sense to interpret a statute that goes out of its way to immunize budget-setting from the collective bargaining process in a manner that permits bargaining over one of the most significant components of any agency's budget. See pp. 27-31, *infra*.

House committee markup, Representative Heftel unsuccessfully introduced a more limited proposal that would have extended the obligation to negotiate to "pay practices" and "overtime practices" so far as "consonant with law and regulation." House Comm. on Post Office & Civil Service, Subcomm. on Postal Personnel & Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute* 1087-1088 (1979) (proposing new § 7115(b)). This unsuccessful attempt to extend the bargaining obligation to wages is particularly significant because "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (citations omitted).

In addition, there are numerous statements in the committee reports that the statute was not meant to authorize wage bargaining. The Senate Report states, without exception, that Title VII of the CSRA "excludes bargaining on economic matters." S. Rep. No. 969, 95th Cong., 2d Sess. 13 (1978). The House Report similarly provides that the statute "does not permit * * * bargaining on wages and fringe benefits." H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978). A supplemental statement to the House report, signed by various members of the governing Committee, emphasized that "[a]mong the collective bargaining rights not included in the bill are: * * * (2) The right to bargain collectively over pay and money-related fringe benefits such as retirement benefits and life and health insurance." *Id.* at 377. In the same vein, the supplemental views of Rep. Solarz noted that the statute "provide[s] that such matters as pay

and fringe benefits be excluded from collective bargaining." *Id.* at 390.

Statements in the floor debate—by the major figures in the bill's passage—are to the same effect. Representative Udall, who authored the compromise that was eventually enacted and whose views must therefore be accorded significant weight (*Simpson* v. *United States*, 435 U.S. 6, 13 (1978)), stressed that the bill would "not permit bargaining over pay and fringe benefits" (124 Cong. Rec. 25,716 (1978)). He later reiterated the point: "There is not really any argument in this bill or in this title about Federal collective bargaining for wages and fringe benefits and retirement—the kinds of things that are giving us difficulty in the Postal Service today." *Id.* at 29,182. Similarly, Representative Clay, a proponent of broad collective bargaining in the public sector, stated unequivocally that federal "employees still * * * cannot bargain over pay." *Id.* at 24,286. He reemphasized the point later on in the debate, stating: "I also want to assure my colleagues that there is nothing in this bill which allows Federal employees the right to * * * negotiate over pay and money-related fringe benefits." *Id.* at 25,720. In addition, Representative Ford, who had proposed the bill that would have allowed all federal employees to bargain about pay, noted that "no matters that are governed by statute (such as pay, money-related fringe benefits, retirement, and so forth) could be altered by a negotiated agreement" under the bill Congress passed. *Id.* at 25,721; see also *id.* at 29,188 (remarks of Rep. Derwinski) (stating that "wages, fringe benefits, and number of employees in an agency" remain beyond the scope of collective bargaining).

3. The court of appeals acknowledged that "some legislators' remarks baldly assert that wages are not negotiable." Pet. App. 12a. Yet it dismissed those statements as irrelevant because, in its view, other comments "indicate that the legislators merely were assuring their peers that the [statute] would not supplant specific laws which set wages and benefits." *Ibid.*; see H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978) (fringe benefits are excluded from bargaining "because they are specifically provided for by statute"); 124 Cong. Rec. 29,174 (1978) (remarks of Rep. Collins) (criticizing the bill because it excluded from bargaining "those few [matters] specifically prescribed by law—for example, pay and benefits"). But these comments, which relate the prohibition against wage negotiation to the fact that Congress sets the wages of most federal employees, do not say or suggest that only the wages of such employees cannot be negotiated. Thus they do not conflict with the repeated statements in the legislative history that wages are not negotiable at all, and those statements are consistent with the most natural reading of the statutory language. "[T]he presumption that legislators mean what they say would seem more appropriate than the opposite presumption." *K Mart Corp.* v. *Cartier Corp.*, 108 S. Ct. 1811, 1824 n.4 (1988) (Brennan, J., concurring in part and dissenting in part).[11]

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[11] The court of appeals also noted (Pet. App. 11a) that, in discussing Section 7103(a)(14)(C), which removes from the definition of "conditions of employment" matters that are "specifically provided for by Federal statute," Representative Clay stated that "where a statute merely vests authority over a particular subject with an agency official with the official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bar-

The court of appeals also based its holding on two decisions of the FLRA's predecessor, the Federal Labor Relations Council (FLRC), which "allowed federal employees to negotiate wages in the rare instances where Congress did not specifically establish wages and fringe benefits." Pet. App. 12a (citing *Overseas Education Association, Inc. and Department of Defense, Office of Dependents Schools*, 6 F.L.R.C. 231, 231 (1978), and *United Federation of College Teachers and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 212 (1972)). The court noted the provision of 5 U.S.C. 7135(b) that pre-CSRA decisions remain in effect "unless superseded" and said that "Congress should have known" of the two FLRC decisions. Pet. App. 12a-13a.

The court of appeals' reliance on the two FLRC decisions is misplaced. First, the prior law was superseded by Section 7102(2), which provides that only "conditions of employment" are negotiable.[12] As we have shown, Congress has long understood that

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gain over conditions of employment." 124 Cong. Rec. 29,187 (1978). However, Representative Clay nowhere suggested that pay is among those discretionary issues that are bargainable under any circumstances. In view of his assurances that pay is not negotiable under the bill, the court of appeals' conclusion that he thought otherwise, based on his statement with respect to Section 7103(a)(14)(C), "puts Congressman Clay at war with himself over the issue." *Military Sealift Command*, 836 F.2d at 1418.

[12] The language of Section 11(a) of Executive Order No. 11,491 (see 5 U.S.C. 7101 note), which governed federal-sector labor relations prior to 1978 and made "working conditions" negotiable, is admittedly similar to the definition of "conditions of employment" in Section 7103(a)(14). But the Executive Order did *not* use the phrase "conditions of employment."

phrase not to include wages, and the legislative history of Title VII of the CSRA confirms that the phrase was not given a different meaning here. Thus, the assumption of the court below that Congress intended the FLRC decisions to continue in force "is plainly inapposite in a situation, such as the case at hand, where Congress has clearly expressed its intent to the contrary." *Department of Defense Dependents Schools*, 863 F.2d at 993 n.9.[13]

Second, the two FLRC decisions are nowhere mentioned in the legislative history and it appears that Congress was unaware of them. Indeed, in describing federal labor relations practices under the Executive Order, Senator Sasser told his colleagues that "Federal employees may not bargain over pay or fringe benefits." 124 Cong. Rec. 27,549 (1978); see *id.* at 24,286 (statement of Rep. Clay) ("employees still * * * cannot bargain over pay" under Title VII of the CSRA). Thus, to the extent that Congress intended to continue pre-CSRA bargaining practices, it evidently believed that, under those practices, wage bargaining was not allowed.[14]

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[13] Moreover, the issue whether wages are "working conditions" was not squarely presented (or addressed by the FLRC) in either case. Rather, the question presented in both cases was whether the proposals at issue were contrary to other statutes and regulations—a question analogous to the *third* question presented here. Thus, at most, the FLRC decided only sub silentio that compensation was a negotiable working condition.

[14] Furthermore, the two FLRC cases are inapposite because, in both cases, the proposals at issue sought to implement the governing law. In *United Federation of College Teachers*, teachers at the Merchant Marine Academy, who were to be paid salaries comparable to those paid at the Naval Academy, made proposals that "fall within the range of 'comparability'

4. Finally, given that wages are the central subject of collective bargaining in the private sector, common sense suggests that Congress would not authorize collective bargaining over the wages and fringe benefits of federal employees through "vague intimation or oblique reference." *Nuclear Regulatory Commission*, 879 F.2d at 1228. Moreover, federal wage bargaining would involve not only negotiation but third-party *arbitration* when an impasse was reached. Such a process would effect a "withdrawal of political accountability in public-sector compensation that substitutes for the competitive pressures constraining private-sector collective bargaining." *Id.* at 1231. Thus any determination that Congress has authorized wage bargaining for federal employees should be supported by convincing evidence. See also *Fort Knox Dependent Schools*, 875 F.2d at 1182 ("[i]t is obvious that salary and fringe benefits are the items most likely to involve substantial overspend-

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or 'similarity.'" 1 F.L.R.C. at 212. Similarly, in *Overseas Education Association*, which involved teachers at overseas schools operated by the United States government who were to be paid salaries comparable to those paid in large urban school districts in the United States, the proposal at issue implemented the governing statute by providing that salaries would be determined by sampling a geographically diverse set of cities constituting 60% of the school districts in cities with populations of over 100,000. The FLRC found "no indication" that the proposal would fail to implement the statute properly. 6 F.L.R.C. at 233. Here, in contrast, the majority of the proposals at issue—including the proposed 13.5% pay raise—do not purport to be modeled on practices at comparable public schools in the State, as the dependents schools statute provides. Thus, even if the two FLRC decisions did support the conclusion that bargaining over wages is appropriate in some circumstances, they would not support the conclusion that the proposals here are negotiable.

ing if left to collective bargaining"). Unlike all the instances in which Congress has authorized bargaining over wages, no such clear evidence exists in this case.[15]

II. THE PROPOSALS INTERFERE WITH THE AGENCY'S RIGHT TO SET ITS BUDGET

The "management rights" provision of Title VII of the CSRA, 5 U.S.C. 7106(a), provides that agency management need not bargain over certain specified matters. That provision was enacted in order to give the federal government "the power to manage and the flexibility that it needs." 124 Cong. Rec. 29,182 (1978) (remarks of Sen. Udall). Through the "broad statement of management rights" (H.R. Rep. No. 1403, 95th Cong., 2d Sess. 12 (1978)), Congress "specifie[d] areas for decision which are reserved to the President and heads of agencies, which are not subject to the collective bargaining process" (S. Rep. No. 969, 95th Cong., 2d Sess. 12-13 (1978)).

Among the rights listed in Section 7106(a) is management's right to set the budget: the statute provides that nothing in Title VII of the CSRA shall "affect the authority of any management official of any agency—(1) to determine the * * * budget * * * of the agency." Accordingly, proposals that would affect the agency's budget implicate matters on which the agency "may not negotiate under any circum-

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[15] If the Court reverses the decision of the court of appeals on the basis that compensation is not a negotiable condition of employment, then, as Chairman Calhoun concluded (Pet. App. 46a), all of Proposals 2 and 3 are non-negotiable, and all but subparts A and D of Proposal 1 (which appear merely to require Fort Stewart to inform and consult with the Union) are non-negotiable.

stances." H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 153 (1978); see H. R. Rep. No. 1403, *supra*, at 43 ("Management may not bargain away its authority to make decisions in these areas"); 124 Cong. Rec. 27,539 (1978) (remarks of Sen. Percy) (agency budgets are "[s]pecifically excluded from the scope of bargaining").

The FLRA has decided that a proposal is nonnegotiable on acount of management's right to control the agency budget if the proposal "will result in significant and unavoidable increases in costs not affected by compensating benefits." Pet. App. 36a (citing *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604 (1980)). Almost all proposals have some costs and some effect on agency expenditures, and, accordingly, a rule that a proposal is not barred unless it has more than a de minimis budgetary effect seems reasonable. However, the application of the FLRA's rule here—particularly the conclusion that the proposal calling for a 13.5% pay raise would not significantly affect the agency's budget—is plainly flawed. And the other aspect of the FLRA's rule—requiring management to show that a significant increase in costs would not be offset by compensating benefits—is not reasonable or consistent with the statute, because it negates management's right to set the agency budget. The decision whether benefits are worth the cost lies at the heart of the budget process.

1. Contrary to the FLRA (Pet. App. 37a) and the court of appeals (*id.* at 20a), the proposals here, if adopted, would have a significant impact on the budget of the Fort Stewart Schools. "Teacher salaries" are "by far the largest item in any school's

budget." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 11 (1973). A 13.5% across-the-board pay raise for teachers would therefore have a "significant" effect on the school budget under any reasonable use of the term. Even apart from the increase in expenditures that implementation of the proposal would require, the proposal would have a "significant effect" by depriving management of control over the major item in its budget. And in this case, the proposed pay raise would substantially increase the agency's costs.[16]

The court of appeals considered the costs of the Union's proposals insignificant only because it compared the increase in the cost of operating the dependent schools to the Army's budget as a whole, including the cost of "bases, troops, weapons, vehicles, other equipment, salaries for all other officers, and expenses for its eight other schools." Pet. App. 20a. That approach makes no sense. Whether a proposal will have a significant budgetary effect should be tested by comparison with the expenditures of the program employing the bargaining unit employees, not the entire agency budget. Otherwise, few proposals could be found to have "significant" effects, and the budget right would be a virtual nullity. That consequence is especially clear in this case. Given the Army's share of the defense budget, any proposal involving dependents schools could only amount to a tiny percentage of the Army's total expenditures, or

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[16] Whether each of the various subparts of Proposals 1 and 3 would have a significant effect is not as clear. If the Court reverses the decision below on the basis of the budget question alone, it may wish to remand the case with instructions that the FLRA reconsider the negotiability of the other proposals under the appropriate standard.

even of its salaries for personnel.[17] Thus, if Congress's judgment that agency management must have control over the agency budget is to be honored, the effect of a proposal must be tested against the program budget, not the agency budget.[18]

2. The FLRA's requirement of proof that a proposal would not have compensating benefits is unreasonable and contrary to the statute. It is unreasonable because it requires the agency to prove a negative—a requirement it could seldom, if ever, satisfy. In this case, for example, the only compensating benefit that has been suggested is that higher salaries and improved benefits will "attract better, harder-working teachers." Union's Br. in Opp. 18. That the FLRA is willing to rely on such an assertion indicates that any proposal to increase compensation would, in its view, be negotiable.

The compensating benefits requirement is contrary to the statute because "the FLRA's test makes itself, not the agency, the arbiter of the agency's budget."

[17] In fiscal year 1989, Congress appropriated more than $24.48 billion for pay and allowances for the military personnel employed by the Army. Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, 102 Stat. 2270.

[18] The Union argues (Br. in Opp. 17-18) that the language of the management rights provision, which states that management has control over the budget "of the agency," supports the conclusion that a proposal must be tested against the agency budget as a whole. But read literally, Section 7106(a)(1) gives management *unfettered* control over the budget. While we concede that some sort of de minimis test should be employed so that the scope of bargaining is not restricted unduly, nothing in the language of the statute requires such a test. Moreover, although it is appropriate to restrict the literal language of the budget right so as not to eclipse the bargaining obligation, it is not necessary to render the budget right meaningless.

Nuclear Regulatory Commission, 879 F.2d at 1233. A budget is "a plan for the coordination of resources (as of money or manpower) and expenditures." *Webster's Third New International Dictionary* 290 (1981). The quintessential decision that a federal agency makes when determining its budget is whether the benefits that flow from a given allocation of resources exceed its costs. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (requiring cost-benefit analysis for agency actions). Thus, to preserve to management the right to determine the agency's budget, as Congress did, is to say that it is up to management, and management alone, to determine the optimal allocation of the agency's resources. See *Nuclear Regulatory Commission*, 879 F.2d at 1233 ("Congress * * * has vested the NRC with the responsibility of balancing employee compensation against the agency's other goals").

III. THE PROPOSALS ARE INCONSISTENT WITH AN ARMY REGULATION FOR WHICH THERE IS A "COMPELLING NEED"

Federal agencies are not required to bargain over "matters which are the subject of an[] agency rule" for which there is a "compelling need." 5 U.S.C. 7117(a)(2).[19] Section 241(a) of the dependents schools statute directs the government to provide an educa-

[19] The Authority has set forth "illustrative criteria" for determining whether an agency regulation is supported by a compelling need. Under these criteria, a compelling need exists for an agency regulation if the regulation "implements a mandate to the agency * * * which implementation is essentially nondiscretionary in nature" (5 C.F.R. 2424.11(c)), or if the regulation "is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency" (5 C.F.R. 2424.11(a)).

tion comparable to that provided by local public schools, while Section 241(e) requires the Army to do so at a comparable per-pupil cost. The Army's dependents schools regulation (Army Reg. 352-3, 1-7 (h)) implements the mandate of Sections 241(a) and 241(e) by stating that the education provided by Section 6 schools "will be considered comparable to free public education offered by selected communities of the States" when various factors, including "salary schedules," are, "to the maximum extent practicable, equal." It is undisputed that the proposals at issue, most of which do not purport to make teachers' compensation at the Fort Stewart Schools comparable to that provided at public schools in the State, are contrary to the regulation.[20]

Section 241 does not specifically provide that teachers' salaries at dependents schools must be set by comparison with those at local public schools.[21] But

[20] Accordingly, if the Court reverses the decision below on the ground that the proposals conflict with the Army's regulation, all of Proposals 2 and 3 would be non-negotiable. All of Proposal 1 except for subparts A and D, which appear to assume (contrary to the other proposals) that compensation is to be set by comparison with local public schools, would also be non-negotiable.

[21] If it did, then proposals relating to compensation would be non-negotiable under Section 7103(a)(14)(C), which provides that "conditions of employment" do not include matters that are "specifically provided for by Federal statute." An explicit statutory direction that teachers' salaries are to be set by comparison with those of their counterparts at public schools would "specifically provide[] for" the matter. Respondents should not disagree on this point, as they concede (see Union's Br. in Opp. 16) that craft employees subject to the Prevailing Rate Act may not bargain about their compensation.

Congress recognized the importance of teachers' salaries in the dependents school statute by stipulating that "[f]or the purpose of providing such comparable education," teachers' salaries and benefits "may be fixed without regard to the Civil Service Act." 5 U.S.C. 241(a). Because teachers' salaries are such an important component of per-pupil costs, it is a fair reading of the statute to conclude that Congress excepted them from the civil service laws so that they would be set by comparison with those at public schools.[22] Thus, even in the absence of the regulation, proposals relating to teachers' compensation would appear to be non-negotiable under Section 7117(a)(1) as "inconsistent with * * * Federal law."

In any event, the Army has promulgated the regulation at issue. And because education is so labor-intensive, there is a compelling need for that regulation within the meaning of Section 7117(a)(2).[23] In view of Section 241(e)'s requirement of comparable per pupil costs, any substantial increase in teacher salaries at dependents schools would force substantial

[22] It is not clear that Congress intended that all ten of the factors listed in the Army's regulation, including those that do not directly and substantially affect per-pupil costs, be set by comparison with public schools.

[23] The FLRA suggests in 5 C.F.R. 2424.11 that there is a compelling need for a regulation only if it implements a statutory mandate that leaves an agency absolutely no room for discretion. But that cannot be the rule. If it were, there would be no case where a proposal was not exempted from negotiability under Section 7117(a)(1) as inconsistent with federal law, but nevertheless was exempted under Section 7117(a)(2) as contrary to an agency regulation for which there is a compelling need. In other words, under the FLRA's rule, Section 7117(a)(2) would add little or nothing to Section 7117(a)(1).

cutbacks elsewhere. And if, for example, the schools decided that in order to offset a salary increase they had to hire fewer teachers, thereby adversely affecting the pupil-teacher ratio, parents justifiably would complain that the Army was not complying with Section 241(a)'s mandate to provide an education comparable to that provided at local public schools. Thus, the Army's regulation is surely correct when it states that, in designing a system to provide an education comparable to that at public schools in the State at a comparable per-pupil cost, it is necessary to pay teachers comparable salaries.[24]

The primary basis for the court of appeals' decision to overturn the Army's regulation was its conclusion that the Army can provide a comparable education at a comparable per-pupil cost "notwithstanding large variations in the employees' wages because many expenses beyond their salaries enter into the per pupil expenditures." Pet. App. 18a. But the court gave no useful guidance as to "how this legerdemain might be accomplished." *Fort Knox Dependent Schools*, 875 F.2d at 1182. It is fanciful to say

[24] Maintaining equality of teacher salaries is also important in furthering Congress's goal of assisting those local school systems that suffer adverse economic effects caused by their proximity to large federal installations. § 1, 64 Stat. 1100-1101; S. Rep. No. 2458, 81st Cong., 2d Sess. 1-2 (1950); H.R. Rep. No. 1137, 95th Cong., 2d Sess. 1-3 (1978). If the Section 6 schools paid more and had appreciably more desirable leave and benefit policies than neighboring local school systems, those systems would probably be forced to match salary and benefits or suffer a loss in the quality of their personnel. Thus, increases in compensation due to collective bargaining proposals submitted by teachers at dependents schools would place an economic burden on local school systems that would undermine the statute's goal of assisting—not burdening—the local public schools.

that the Army can permit a 13.5% increase in salaries, or a significant increase in paid leave and benefits, and still provide a comparable education at a comparable per-pupil cost. The court's suggestion that the schools might cut back on "books, building maintenance, athletic programs, clubs, and lunch services" (Pet. App. 19a) is not helpful, since such costs are a relatively small percentage of any school system's budget. See Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 Yale L. J. 409, 418 & n.36 (1973). Even if the deficit could be made up by drastically cutting non-wage expenditures, it would be unlikely that the resulting education would be comparable. As the court of appeals acknowledged, "[m]any factors other than teachers' compensation also affect the quality of education." Pet. App. 19a. A school system that promotes teacher compensation to the exclusion of those other factors cannot provide an education comparable to local public school systems that treat teacher compensation as one factor among many contributing to a quality education.[25]

[25] The court of appeals also stated (Pet. App. 14a) that to interpret "comparable education" to require "comparable salaries" would be impermissible because it would render redundant Section 241(a)'s requirement that teachers employed in U.S. territories receive "compensation * * * on the same basis as provided for similar positions in the public schools in the District of Columbia." (Under Section 241(a), schools in the territories are to be comparable to schools in the District of Columbia.) But in fact, as the legislative history of that provision shows, it was intended simply to "unequivocally align" the salaries of teachers in the territories with those of the D.C. public schools, not to establish a new statutory requirement. See H.R. Rep. No. 1137, 95th Cong., 2d Sess. 108 (1978). In any event, since the cost of living in the territories might be significantly different from the cost of living in the

The court of appeals also noted (Pet. App. 19a) that Section 241(a) and Section 241(e) both require compliance with the obligations they impose "to the maximum extent practicable." But, contrary to the court of appeals' suggestion, these provisos do not confer a wide-ranging grant of discretion. To the contrary, the statute mandates comparability to the *maximum* extent practicable. Through the provisos, Congress has provided a limited safety-valve permitting the Army to diverge from the statutory mandates when, as a practical matter, it would be extremely difficult to comply with them. There is no contention that the proposals here are justified by considerations making comparability impractical. And there is no reason to interpret the provisos to overrule the rest of the statute by authorizing bargaining over proposals that do not purport to be based on practices at local public schools.

District of Columbia, there might be some question as to whether it was necessary to pay the same salary in the territories to hire comparable teachers. But there is no serious question that a comparable education requires comparable teachers' salaries where, as here, the Army has been directed to provide an education comparable to that provided by public schools in the same State where the dependents schools are located.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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